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NEW JERSEY

EMPLOYMENT LAW LETTER

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John C. Petrella, Dina M. Mastellone, Editors
Genova Burns LLC

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MARIJUANA USE

New Jersey expected to OK recreational pot in 2019

by Justine L. Abrams

State laws legalizing the use of marijuana—whether for medical or recreational purposes—have been a fast-moving target over the last several years. Currently, 33 states (including the District of Columbia) have legalized medical marijuana, 10 of which have also legalized recreational marijuana. There are only 18 states in which marijuana is still illegal for both medical and recreational purposes but several allow medical use of marijuana plant extract. The movement toward legalization is a national trend.

In New Jersey, medical marijuana is legal, and the state legislature will likely pass recreational pot legislation this year. Below is a summary of the information employers should know as they wrestle with how to handle employees who consume marijuana, legal or otherwise.

Outlook for recreational marijuana in NJ

In New Jersey, recreational marijuana is currently illegal under the state's criminal code. In November 2018, however, members of the state legislature introduced the New Jersey Cannabis Regulatory and Expungement Aid Modernization Act. If enacted, the bill would make it legal for adults (ages 21 or older) to use or possess up to one ounce of marijuana for recreational purposes in private residences or certain

commercial consumption spaces with a retail license to sell the drug. Notably, the legislation does not allow recreational marijuana use in the workplace.

In its current form, the bill limits employers' rights to take adverse actions against applicants and employees based on their use or nonuse of recreational marijuana; there must be a "rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee." That antidiscrimination provision is similar to an existing New Jersey law protecting applicants and employees from workplace discrimination on the basis of their use or nonuse of tobacco products. It had been taken out and added back into the recreational pot bill, and it remains unclear whether it will be included in the final version of the law. However, even though the bill currently prohibits employers from making hiring and firing decisions based on an individual's legal use or nonuse of recreational marijuana, the bill clearly preserves employers' rights to maintain drug-free policies prohibiting any marijuana use or possession in the workplace.

In summary, while New Jersey law may protect applicants and employees from workplace discrimination on the basis of their use or nonuse of marijuana like it currently does tobacco products, employers will still be permitted to



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AGENCY ACTION

NLRB names new solicitor. The National Labor Relations Board (NLRB) in December announced the appointment of Fred B. Jacob as its new solicitor. The solicitor is the chief legal adviser and consultant to the Board on all questions of law regarding its general operations and on major questions of law and policy concerning the adjudication of NLRB cases in the courts of appeals and the U.S. Supreme Court. The solicitor also serves as the Board's legal representative and liaison to the General Counsel and other offices of the agency. Jacob has spent more than two decades practicing labor law and advising federal agencies on ethics, administrative law, and government operations.

USCIS reaches H-2B cap for first half of fiscal year 2019. U.S. Citizenship and Immigration Services (USCIS) reached the congressionally mandated H-2B cap for the first half of fiscal year 2019 on December 6, meaning no more cap-subject petitions for H-2B workers wishing to start work before April 19 were accepted after December 6. The H-2B program allows U.S. businesses to employ foreign workers for temporary nonagricultural jobs. The cap is 66,000 per fiscal year, with 33,000 for workers who begin employment in the first half of the fiscal year (October 1 through March 31) and 33,000 for workers who begin employment in the second half of the fiscal year (April 1 through September 30).

NLRB issues strategic plan. The NLRB in December issued its strategic plan for fiscal years 2019 through 2022. The Board's announcement said the plan contains four goals to support the vision of NLRB Chairman John Ring and General Counsel Peter Robb: (1) achieving a collective 20 percent increase (five percent over each of four years) in timeliness in case processing of unfair labor practice charges, (2) achieving resolution of a greater number of representation cases within 100 days of the filing of an election petition, (3) achieving organizational excellence and productivity, and (4) managing agency resources efficiently and in a manner that instills public trust.

OFCCP launches new directives. The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) has announced three new directives aimed at establishing an opinion letter process and enhancing its help desk, establishing a process to resolve compliance evaluations at the earliest stage possible, and clarifying the agency's compliance review procedures. The OFCCP enforces federal laws that prohibit federal contractors and subcontractors from discriminating based on race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. ♣

implement policies banning marijuana from the workplace. The bill is expected to pass a full legislative vote and receive Governor Phil Murphy's signature later this year.

Status of medical marijuana in NJ

Under the New Jersey Compassionate Use of Medical Marijuana Act (CUMMA), the medical use of the drug is legal in the state for "qualifying patients," which is generally defined by the statute as people who:

- Suffer from a "debilitating medical condition" such as glaucoma, HIV/AIDS, cancer, multiple sclerosis, inflammatory bowel disease, Crohn's disease, Lou Gherig's disease, muscular dystrophy, certain terminal illnesses, seizure disorders, chronic pain, and posttraumatic stress disorder;
- Receive a written certification from a healthcare provider registered with the New Jersey patient registry; and
- Hold a state-issued medical marijuana identification card.

The CUMMA does not expressly protect employees and applicants from workplace discrimination on the basis of their legal medical marijuana use. As a result, when read alone, the Act would seem to allow employers to take an adverse employment decision against somebody because she is a marijuana user, even if she is using it for a legal, authorized medical purpose.

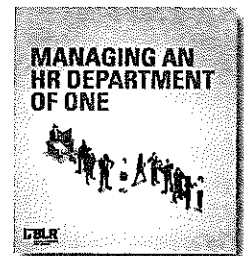
Not so fast. The New Jersey Law Against Discrimination (NJLAD) protects individuals with disabilities from workplace discrimination, and you can presume that those suffering from any of the debilitating conditions listed in the CUMMA are disabled and thus protected. Therefore, an employer that knows an individual uses medical marijuana will be imputed with the knowledge that the person is disabled and therefore entitled to protection from discrimination.

That said, the CUMMA provides that employers need not accommodate any on-site use of medical marijuana, even though they may need to allow off-site use as a reasonable accommodation.

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In conflict with federal law

Under federal law, marijuana is still illegal and is considered a Schedule I drug, which is defined as a drug for which there is a high potential for abuse and no currently accepted medical use. In short, in the eyes of the federal government, marijuana is in the same category as heroin and LSD.

That classification creates various legal and practical implications for employers in states (such as New Jersey) in which marijuana and/or THC can be used legally. Can or should you prohibit employees from using marijuana? If so, to what extent? And as we've seen above, what is your obligation to make exceptions for medically prescribed marijuana?

While there are no one-size-fits-all solutions to those questions, there are some steps you can take to determine what you are required to do and what you are allowed to do.

Determine if you are subject to Drug-Free Workplace Act

This federal law requires all federal contractors and federal grant recipients to adopt a zero-tolerance policy for employees' use of illegal drugs (which may include unauthorized use of otherwise legal drugs), certify to the federal government that their workplaces are drug-free, and satisfy a variety of other requirements. The law applies to any organization that receives either:

- A federal contract of \$100,000 or more; or
- A federal grant of any size.

If you are subject to this law, you need to comply with it regardless of what New Jersey law says about marijuana's legality.

Develop or modify a drug policy

Because marijuana is still illegal under federal law, employers would technically be allowed to prohibit employees from using marijuana completely, the same as any other illegal drug. However, depending on the nature of your business, and because of the strict requirements of the laws protecting the rights of individuals with disabilities to receive reasonable accommodations, you may want to consider a policy that does one or more of the following:

- Completely prohibits marijuana use during work hours and/or at the workplace (although it is possible employers could be required to allow employees to take breaks or change work hours/shifts in order to use medical marijuana as an accommodation of a disability under the Americans with Disabilities Act (ADA));
- Prohibits employees from using marijuana or any other drug that is illegal under federal, state, or local

law at any time (unless they can show a valid prescription for it);

- Imposes discipline on employees who test positive for marijuana use (unless they have a prescription);
- Bars employees who use medical marijuana from certain safety-sensitive positions if there is reasonable concern they would pose a risk of harm to themselves or others (or, possibly, a risk of substantial harm to company property); and/or
- Specifies that, although marijuana has been legalized for certain purposes under a particular state law, it remains illegal under federal law and the company's policies, and therefore will not be permitted in the workplace.

Decide how you want to enforce your policy

Because of the wide variation in cannabis products, their strength, the differences in how individuals metabolize THC, and the fact that current drug testing technology cannot accurately determine approximate degrees of impairment, it is practically impossible to tell through drug testing alone whether a person who has smoked or consumed marijuana is actually impaired at the time of testing. This inhibits enforcement of policies banning use in the workplace, as employers can only rely on other observable factors suggesting impairment, like an employee's behavior, appearance, body odors, or speech. While at this point there is no standard similar to blood alcohol levels for determining impairment under DUI laws, at least two states use a threshold of five nanograms of THC per milliliter of blood. Regulations under the Drug-Free Workplace Act provide similar thresholds for the presence of THC in urine.

Because there is no uniform standard, you have two choices. The simplest would be to enact a zero-tolerance policy for marijuana use, but that may not always have an equitable outcome. If you are not comfortable with that option, you could adopt one of the thresholds mentioned above or, preferably, work with your attorney to select a standard that is reasonable and works for you.

Final thoughts

Because of the extremely complicated nature of these issues, it is imperative that you work with a qualified employment attorney to develop a drug use and testing policy that takes into account the specific state and federal laws that apply to you. That is especially true if you have employees in multiple states. We expect more states—such as New Jersey—to enact marijuana legislation in the coming months, so definitely stay tuned!

For more information about workplace laws on medical and recreational marijuana, please contact Justine L. Abrams,

an associate in Genova Burns' Cannabis Law and Employment Law and Litigation practice groups, at jabrams@genovaburns.com or 973-230-2089. ♣

AGE DISCRIMINATION

New Jersey courts can't agree on arbitration assent by e-mail

by James W. Sukharev

A recent decision from the U.S. District Court for the District of New Jersey in AT&T Mobility Services LLC v. Horowitz addresses the same arbitration agreement considered in a previous decision from a sister court in AT&T Mobility Services LLC v. Jean-Baptiste, and the two rulings are directly at odds on what constitutes "assent" when a company's arbitration agreement is provided to employees by e-mail.

Facts

Roy Horowitz was employed by AT&T for more than 20 years before his termination in June 2016 at the age of 56. Kathleen Sweeney worked at the company for more than 18 years before her discharge in July 2016 at the age of 51.

Back in December 2011, Horowitz and Sweeney received a message to their AT&T e-mail addresses advising them the company had created an alternative dispute resolution process that provided for third-party arbitration to resolve disputes between the employer and its employees. The e-mail further stated participation in the program was optional and advised the employees, "If you do not opt out by the deadline, you are agreeing to the arbitration process as set forth in the Agreement."

The e-mails were successfully transmitted to Horowitz and Sweeney, and AT&T records showed they clicked on the hyperlink in the message and accessed the webpage containing the text of the arbitration agreement. Neither employee opted out of the agreement.

Following their termination, Horowitz and Sweeney filed a complaint against AT&T alleging violations of the Age Discrimination in Employment Act (ADEA) and the Older Workers Benefit Protection Act (OWBPA). Thereafter, AT&T filed a request to compel arbitration in accordance with the agreement presented to Horowitz and Sweeney via e-mail in December 2011. In opposing the

request, the two former employees argued they never affirmatively agreed to be bound by the pact and that their failure to opt out of it cannot be considered assent.

District court's decision

In analyzing whether the employees' failure to opt out of the arbitration agreement constituted assent, the district court considered New Jersey contract principles, relying primarily on the New Jersey Supreme Court decision in *Leodori v. CIGNA Corp.* and the *Second Restatement of Contracts* §30 (1981). The district court emphasized the *Leodori* court's holding "that an arbitration provision cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement to it" (emphasis in original).

The district court further pointed to its own earlier decision in *Schnell v. Morgan Stanley & Co.*, for the proposition that "the law does not require a signature for a waiver to be valid." Moreover, the court quoted the *Second Restatement of Contracts* § 30 (1981), stating an "offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act."

The district court found that Horowitz and Sweeney accepted the arbitration agreement's terms by receiving notice of it, clicking on the link, and failing to opt out within the deadline. Moreover, the court rejected the employees' argument that clicking on the hyperlink doesn't prove they read or fully understood the agreement's terms. The court noted their failure to read the pact didn't excuse them from being bound to it after assenting to it.

Contrast to Jean-Baptiste

In *AT&T Mobility Services LLC v. Jean-Baptiste*, the sister court rendered a decision that was directly at odds with the holding in *Horowitz* regarding the same arbitration agreement. In sum, the district court in *Jean-Baptiste* held that enforceability of the agreement can result only from an "explicit, affirmative agreement that unmistakably reflects the employee's assent."

In departing from the holding in *Jean-Baptiste*, the district court in *Horowitz* declared that it "respectfully disagree[d]" with the *Jean-Baptiste* court's holding and interpretation of *Leodori* and emphasized that the holding in *Leodori* provided for circumstances in which a

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party can give assent without affirmatively providing a signature. Specifically, the *Horowitz* court concluded that “[in *Jean-Baptiste*], the [former employee] did provide ‘some other unmistakable indication’ that she affirmatively agreed to arbitrate her claims by accessing the Arbitration Agreement and clicking on the ‘Review Completed’ button” without subsequently opting out of the pact.

Bottom line

Courts applying New Jersey’s contract principles to arbitration agreements are split on whether the failure to opt out of an agreement after receiving notice is sufficient to signify intent to be bound by it. Ultimately, employers bear the burden of obtaining assent to arbitrate disputes. Despite the holding in *Horowitz* that an employee who receives notice of an arbitration agreement and fails to opt out has provided assent, you are better off obtaining the most unambiguous form of assent possible, such as a signature.

If there is any lesson from the divergent opinions in *Horowitz* and *Jean-Baptiste*, it’s that ambiguous forms of assent will hinder precisely what arbitration is designed to achieve—efficiency and cost-effectiveness in resolving disputes.

For more information about arbitration agreements, please contact John C. Petrella, chair of Genova Burns’ Employment Law and Litigation Practice Group, at jcpetrella@genovaburns.com or 973-533-0777. ♦

WEATHER EMERGENCIES

Snow days: Must you pay when inclement weather keeps workers home?

by Dina M. Mastellone

In anticipation of snow season, many New Jersey employers have been trying to figure out if and when they must pay employees during work shutdowns caused by severe weather conditions. For the most part, the answer depends on an employee’s status under the Fair Labor Standards Act (FLSA). You must carefully follow the appropriate FLSA regulations and guidance. Otherwise, you could jeopardize an employee’s exempt status. Here are some guidelines to help you determine whether to pay employees on snow days—or in any other condition that causes an unexpected workplace closing.

Exempt employees: work closed

When a workplace shuts down for less than a full work-week because of inclement weather, exempt employees may not be docked pay for missed days. Their salaries must remain the same.

You may require employees to use vacation days or other paid leave but cannot force them to take leave without pay. Employees with no accrued leave must still be paid in full.

WORKPLACE TRENDS

Survey finds lack of understanding of when workers will retire. U.S. employers are rethinking their approach to managing the retirement patterns of their workforces, according to a study from Willis Towers Watson. The 2018 Longer Working Careers Survey found that 83% of employers have a significant number of employees at or nearing retirement, but just 53% expressed having a good understanding of when their employees will retire. Additionally, while 81% say managing the timing of their employees’ retirements is an important business issue, just 25% do that effectively. The survey found that 80% of respondents view older employees as crucial to their success.

Urgent hiring needs expected in tech sector. New research shows many technology teams will be growing in the first half of 2019, but staffing challenges exist. Robert Half Technology’s State of U.S. Tech Hiring research shows that 63% of IT hiring decision makers polled plan to expand the size of their teams by adding full-time employees. However, 87% of those surveyed said it’s challenging for their company to find skilled IT professionals. Almost all respondents (95%) said they will bring on project professionals to support their teams in the first six months of the year. In addition, 90% of IT leaders said they are upskilling or training current employees on in-demand technology skills.

Investment in talent development on the rise. A new report from the Association for Talent Development shows that organizations are continuing to make healthy investments in employee learning. The study was sponsored by LinkedIn Learning and the American Management Association. Organizations spent \$1,296 per employee in 2017, up 1.7% from 2016, according to the research. This is the sixth consecutive year that per-employee spending on learning has increased. The report says the use of technology to deliver training continues to increase, but more than half of all learning is delivered in a traditional classroom. The 2018 State of the Industry report is based on a survey of nearly 400 organizations of various sizes, industries, and locations.

Indeed studies weird, wacky job titles trend. Online career platform Indeed has taken a look at what it calls “the state of weird and wacky job titles in 2018” and noted some trends. The research found that in 2018, seven terms performed particularly well: genius, guru, hero, ninja, superhero, rockstar, and wizard. “Ninja” was dubbed the comeback kid of 2018 since there was a 90% increase in ninja job titles between October 2017 and October 2018. The 2017 winner, “rockstar,” slipped in 2018. There was a slight uptick in “genius” jobs, but “heroes” and “wizards” were on the decline. ♦

UNION ACTIVITY

UAW lodges objection to GM announcement.

The United Auto Workers (UAW) in December lodged a formal objection to General Motors' (GM) plan to close four American auto plants in 2019. The complaint objected to what the union called GM's unilateral decision on the future of those facilities. The UAW said the decision was made without the union's agreement, which it says is required by the 2015 National Agreement. "We have been clear that the UAW will leave no stone unturned and use any and all resources available to us regarding the future of these plants," UAW President Gary Jones said. He added that UAW members across the country "are committed to using every means available to us on behalf of our brothers and sisters" at the plants in Lordstown, Ohio; Hamtramck, Michigan; Baltimore, Maryland; and Warren, Michigan.

AFL-CIO leader calls for stronger health, safety protections. The AFL-CIO's safety and health director in December spoke out about new figures from the U.S. Bureau of Labor Statistics (BLS) showing the number of injuries and fatalities at workplaces. "The BLS report shows that too many workers are being killed on the job," Peg Seminario said. "While in 2017, there was a small decline in the number and rate of job deaths, 5,147 workers lost their lives on the job. That is an average of 14 workers dying each and every day." Those figures don't include deaths from occupational diseases like black lung and silicosis, which are on the rise, Seminario said. "Instead of increasing life-saving measures aimed at protecting working people at their workplaces, the Trump administration is rolling back existing safety and health rules and has failed to move forward on any new safety and health protections."

NEA speaks out against school safety recommendations. The National Education Association (NEA) is criticizing the Federal Commission on School Safety's recommendations released in December. "Instead of the Federal Commission on School Safety taking its charge seriously—addressing gun laws in this country and putting supports in place for students after the horrors of Parkland, Marshall County, Santa Fe, and the countless other school shootings that have occurred this year—[U.S. Education Secretary] Betsy DeVos and the commission are doing the exact opposite," NEA President Lily Eskelsen Garcia said. "The recommendations do little to make students safer in our nation's public schools." Garcia also spoke out against DeVos' plan to rescind federal guidance meant to address racial disparities in school discipline. In addition, Garcia said DeVos is using the commission to pursue her agenda to dismantle students' civil rights protections. ♣

Exempt employees: work open

Employers have more flexibility when operations remain open. In that situation, if an employee doesn't come to work because of bad weather, the U.S. Department of Labor (DOL) has deemed the absence to be for "personal" reasons. Such absences need not be paid, even for exempt employees.

The good news is there is another option: You can require employees to use a vacation day or other accrued paid leave for the time. That may be easier for employees to bear than having their pay reduced. Of course, you can always choose to pay the normal amount without any deduction or use of paid time off.

Note: Remember, if you remain open and exempt employees miss work, you can make only full-day pay deductions. An exempt employee who comes to work for any portion of the day must be paid for the entire day.

Nonexempt employees: work either closed or open

In general, you don't have to pay nonexempt (hourly) employees when they perform no work. Therefore, there is no need to pay them when the work premises are closed and they can't perform any work. The same applies when the workplace is open and bad weather keeps employees from coming in: no work, no pay.

Similar to the FLSA, New Jersey law doesn't require employers to pay nonexempt employees for time not actually worked. That includes instances when municipal, county, or state officials have declared a state of emergency.

To maintain good employee morale, however, you may choose to pay for a certain number of snow days. The choice lies solely within your discretion.

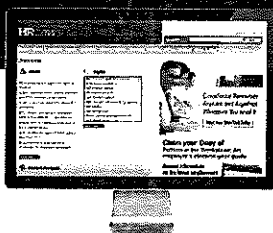
Bottom line

Remember, simple decisions such as whether to pay employees for a snow day can have a dramatic effect on their

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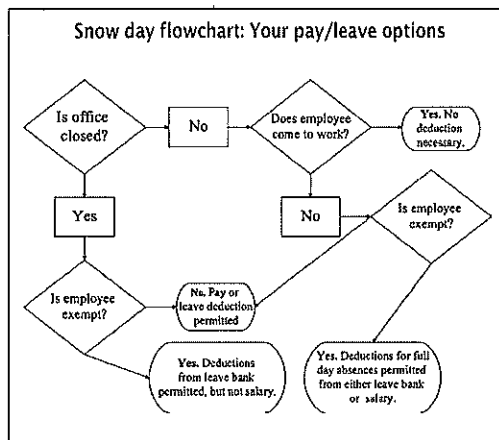


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exempt status under the FLSA. Therefore, it's important to give each decision due consideration and consult with legal counsel.

When inclement weather closes your workplace or prevents employees from getting to work, can you dock employees' pay or leave time? Below is a flowchart to help you answer that question for exempt and nonexempt employees. **Note:** The chart assumes the employer has a leave program. If you don't, employees who don't report to work because of inclement weather are determined to have missed work for personal reasons and can forfeit a full day's pay. But if an employee shows up anytime during the day, she must be paid for the entire day.

Dina M. Mastellone, an attorney with Genova Burns LLC in Newark, New Jersey, can be reached at dmastellone@genovaburns.com. ❖



WORKPLACE ISSUES

Do you have a ghost of a chance against ghosting?

If you're like us (and Seth Meyers), you might have a hard time keeping up with all the latest slang terms having to do with new technologies and trends in social interactions and other aspects of modern life. One such term is "ghosting," which is when a person just stops responding to text messages, usually from someone they recently started dating. The term has slowly spread to other situations in which one person suddenly disappears from another person's life, including—you guessed it—when an employee or job applicant is a no-show with no communication or explanation to the employer.

Ghosting an employer usually happens early on, such as during the recruiting, interview, or job offer stages or the anticipated first day of employment. However, employers are increasingly experiencing it even with longer-term employees. It tends to be most common among lower-paid hourly positions, for which there is currently a lot of competition in a tight labor market, and among the younger generations, who frequently

hold those positions in many industries. But it can happen at any age and any salary range.

While there's no surefire way to prevent ghosting, employers may want to consider a number of possible modifications to their policies and processes that may help minimize it. Here they are, in an order we consider to be (roughly) most to least important. Note that most of these suggestions are geared toward preventing or reducing the damage from ghosting by job applicants and new employees.

Tips to minimize ghosting

1. **Make sure you pay hourly workers a competitive rate.** It's important to consider the hourly rate offered not just by your direct competitors but also by other employers in your area that are generally competing for the same type of employees. For example, retail and fast-food establishments typically compete for the same pool of potential employees. Depending on the nature of your workforce, it may even be worth engaging a compensation analyst to help you develop a sound and nondiscriminatory pay scale and structure.

2. **Streamline/shorten your hiring process.** The longer you string out the hiring process—for example, by subjecting applicants to several interviews when one will do—the more likely applicants are to find work at a company that pays more or is better equipped to snatch them up quickly.

3. **Consider a referral bonus program.** Applicants and employees are far less likely to burn their bridges by ghosting you if a friend who works for you recommended them for the job.

4. **Cultivate a deep pipeline of prospects.** Don't discard applications or résumés from strong applicants just because a job has been filled. Try to identify backups during the hiring process so you can replace a "ghost" employee quickly if necessary.

5. **Foster a positive work environment, and modernize if necessary!** It's surprising how lacking in modern conveniences many employers still are. Make




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employees' schedules available online or in an app. Provide an easy way for them to contact their supervisors in the event of an unexpected absence, such as by text. Don't place unnecessary burdens or unrealistic expectations on employees who need to miss work—for example, by expecting them to find their own replacement. Those are just some of the negative working conditions that may make it tempting for employees—particularly younger ones just starting out in the workforce—to ghost you.

6. Consider offering a mentoring program or apprenticeship opportunities and a clear career path. The younger generation tends to expect swift advancement and pay increases. Without it, they are likely to move on if they get a better offer or after they have gotten what they need out of the position.

7. Consider disclosing ghosting to employers that request references. We all know the reasons not to say anything negative about former employees when a potential employer calls asking for a reference. And while it may be unlikely that you will receive many reference requests on employees who have ghosted you, it's possible. Having a policy that you will disclose ghosting (not using that term) could provide a disincentive in the right circumstances. Make sure you discuss the pros and cons with your employment attorney before adopting such a policy.

8. If you're really desperate, consider over-hiring. It's been reported that in China, where ghosting by newly hired employees is rampant, many employers hire two employees for every job opening in the hopes that one of them will show. We probably aren't to that point yet, but it may be something to keep in your arsenal for the future. ♣

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Editorial inquiries should be directed to Dina M. Mastellone at Genova Burns LLC, 494 Broad Street, Newark, NJ 07102, 732-842-2732, fax 732-758-6597, dmastellone@genovaburns.com.

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